LIBRARY
SUPREME COURT, U. S.

FILED
JUN 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1861

SOUTH GWINNETT VENTURE, a Partnership Composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green,

Petitioner,

versus

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually and as Chief Building Inspector of Gwinnett County,

Respondents.

ROCKBRIDGE ASSOCIATES, LTD., a Georgia Limited Partnership,

Petitioner,

versus

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually and as Chief Building Inspector of Gwinnett County,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

ROBERT N. MEALS, JR.
Troutman, Sanders, Lockerman & Ashmore
Of Counsel

GORDON DEAN BOOTH
1400 Candler Building
Atlanta, Georgia 30303
Attorney for Petitioners

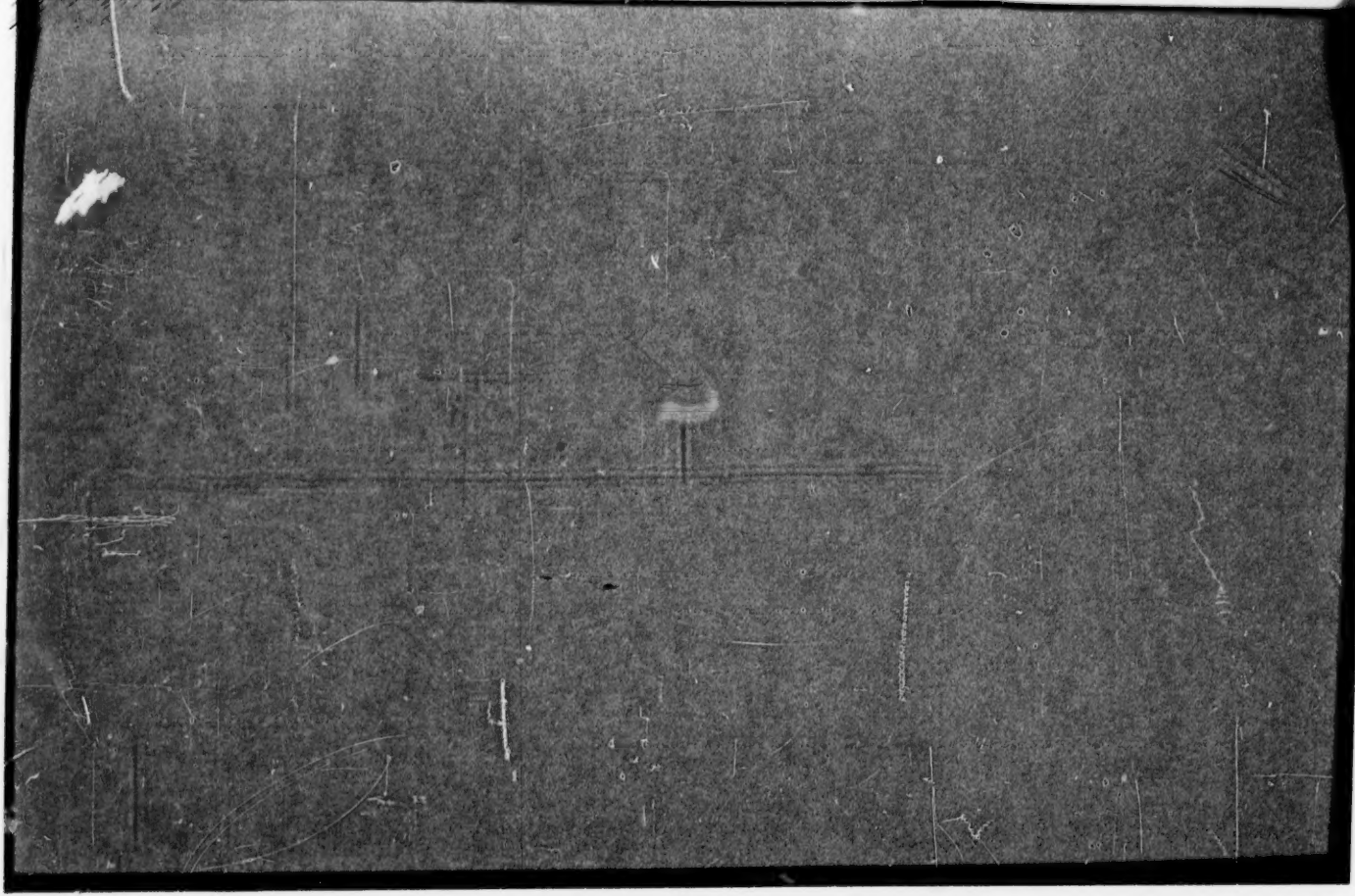

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	5
Rockbridge Associates, Ltd.	5
South Gwinnett Venture	7
Reasons for Granting the Writ	11
I. WHEN A LOCAL ZONING COMMISSION CONSIDERS REQUESTS FROM INDIVIDUAL LANDOWNERS FOR AMENDMENTS TO ITS COMPREHENSIVE ZONING ORDINANCES ON A CASE-BY-CASE BASIS, AND EXERCISES DISCRETIONARY POWERS BY APPROVING SOME APPLICATIONS AND DISAPPROVING OTHERS, IT PERFORMS A PURELY ADJUDICATORY FUNCTION AND DENIAL OF DUE PROCESS IN SUCH ADMINISTRATIVE PROCEEDINGS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION	11
II. RESPONDENTS VIOLATED FUNDAMENTAL FAIRNESS AND THE MINIMAL REQUIREMENTS OF DUE PROCESS AND DENIED PETITIONERS EQUAL PROTECTION OF THE LAW:	
(A) WHEN THEY FAILED TO PRE-	

Page

SCRIBE STANDARDS BY WHICH PETITIONERS' REZONING APPLICATION WOULD BE JUDGED;

(B) WHEN THEY MADE EXTENSIVE USE OF EX PARTE INFORMATION TO REACH THEIR DECISION WITHOUT ADVISING PETITIONERS OF PRECISELY WHAT EVIDENCE WAS BEING CONSIDERED, OR ALLOWING THEM TO CROSS-EXAMINE WITNESSES OR REBUT OR EXPLAIN ADVERSE TESTIMONY; AND

(C) WHEN THEY FAILED TO DISCLOSE ANY FINDINGS OR FACT OR REVEAL ANY EVIDENCE TO SUPPORT ITS CONCLUSION THAT PETITIONERS' REQUEST MUST BE DENIED . . . 19

III. THE PROTECTION OF PRIVATE PROPERTY RIGHTS IS AN INTEREST SO DEEPLY ROOTED IN OUR SOCIAL STRUCTURE AND SO FUNDAMENTAL TO THE STABILITY OF OUR CIVILIZATION THAT PROCEDURAL DUE PROCESS IN AN ADJUDICIARY ZONING PROCEEDING IS REQUIRED TO ENSURE THAT THE COMMISSION'S EXERCISE OF ITS REGULATORY POLICE POWERS, WHICH SEVERELY RESTRICTS AN OWNER'S USE OF HIS PROPERTY, COMPORTS WITH THE CONSTITUTIONAL MANDATE THAT SUCH CONTROLS BE REASONABLY RELATED TO THE PUBLIC HEALTH, SAFETY, WELFARE AND MORALS 36

Page

IV. THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT APPLICABLE TO THE FACTS OF THIS CASE, WHERE THE STATE PROVIDES NO MACHINERY TO PROTECT THE RIGHTS OF A LANDOWNER GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 42

Conclusion 47

Certificate of Service 48

Appendix A—Order of the United States District Court for the Northern District of Georgia ..... A- 1

Appendix B—Opinion and Judgment of the Court of Appeals for the Fifth Circuit A- 9

Appendix C—Order of the Court of Appeals for the Fifth Circuit on its own Motion for Rehearing En Banc A-21

Appendix D—Opinion and Judgment of the Court of Appeals for the Fifth Circuit on Rehearing En Banc A-22

Appendix E—Constitutional and Statutory Provisions A-28

Appendix F—Zoning Ordinance of Gwinnett County, Georgia A-33

Appendix G—A Brief History of Zoning in the United States A-40

TABLE OF AUTHORITIES

Federal Cases	Page
In re Augenbaugh, 125 F.2d 887 (3rd Cir. 1942)	29
Beck v. SEC, 413 F.2d 832 (6th Cir. 1969)	35
Bluefield Water Works and Improvement Co. v. Public Service Commission, 262 U.S. 679 (1923)	17
In re Bowen, 58 F. Supp. 286 (D. Pa. 1944)	29
Brown-Pacific-Maxon Co. v. Turner, 255 F.2d 611 (7th Cir. 1958)	29
Carlson v. Landon, 342 U.S. 524, reh. den. 343 U.S. 988 (1952)	17
Chicago, B. and Q.RR. v. Chicago, 166 U.S. 226 (1897)	37
Citizens Association of Georgetown, Inc. v. Zoning Commission of D.C., 477 F.2d 402 (D.C. Cir. 1973)	16, 30
City of St. Paul v. Chicago, St. Paul, M. and O. Ry., 413 F.2d 762 (D.C. Cir. 1939)	37
Crowell v. Benson, 285 U.S. 22 (1932)	17
Delaware Coach Co. v. Public Service Commission of State of Delaware, 265 F. Supp. 648, 652 (D. Del. 1967)	14
Diedrich v. Zoning Commission of D.C., 393 F.2d 666 (D.C. Cir. 1968)	15
Donovan v. Clarke, 222 F. Supp. 632 (D.D.C. 1963)	15, 18
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	15, 20, 37
Florida Power Corp. v. FPC, 425 F.2d 1196, 1203 (5th Cir. 1970)	35

Federal Cases **Page**

Garner v. Louisiana, 368 U.S. 157 (1961) 35

Goldberg v. Kelly, 397 U.S. 254 (1970) 35

Goldblatt v. City of Hempstead, 369 U.S. 590 (1962) 37

Heckler v. Shepard, 243 F. Supp. 841 (D. Idaho 1965) 29

Hot Shoppes, Inc. v. Clouser, 231 F. Supp. 825 (D.D.C. 1964) aff'd 346 F.2d 834 (D.C. Cir. 1965) 30, 36

Industrial Union Department v. Barber-Coleman Co., 348 F.2d 787 (D.C. Cir. 1965) 35

Interstate Commerce Commission v. Louisville and Nashville Railroad Co., 227 U.S. 88 (1913) .. 24, 27

Jones v. Securities and Exchange Commission, 289 U.S. 1 (1936) 17

Law Motor Freight v. C.A.B., 364 F.2d 139 (1st Cir. 1966) 24

Leventhal v. District of Columbia, 100 F.2d 94 (D.C. Cir. 1939) 37

Market Street Ry. v. Railroad Commission, 324 U.S. 548 (1945) 24

Morgan v. United States, 304 U.S. 1 (1938), reh. den. 304 U.S. 23 (1938) 24, 28, 29

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 18, 24

Ohio Bell Telephone Co. v. Public Utilities Commissions, 301 U.S. 292, 301-303 (1937) 24, 29

Ohio Valley Water Co. v. Ben Avon, 253 U.S. 287 (1920) 17

Federal Cases **Page**

Opp Cotton Mills v. Administrator of Wage and Hour Division of the Dept. of Labor, 312 U.S. 126 (1941) 14

Robey v. Schwab, 307 F.2d 198 (D.C. Cir. 1962) 30, 36

Rockbridge Associates, Ltd. v. Pruitt, 341 F. Supp. 703 (D. Ga. 1971) 2, 23

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) 17

SEC v. Chenery Corp. 318 U.S. 80 (1943) 34

Shenk v. Zoning Commission of D.C., 440 F.2d 295 (D.C. Cir. 1971) 29, 30

Smith v. Dental Products Co., 168 F.2d 516 (7th Cir., 1948) 29

South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973) 2, 42

South Gwinnett Venture v. Pruitt, 487 F.2d 1333 (5th Cir. 1973) mem. op. 2

South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir. 1974) 2, 13

Southern Railway Co. v. Virginia, 290 U.S. 190 (1933) 17

Standard Computing Scale Co. v. Farrell, 249 U.S. 571 (1919) 17

Tejeda v. United States Immigration and Naturalization Service, 346 F.2d 389 (9th Cir. 1965) 35

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 35

Federal Cases **Page**

United States v. Abilene and Southern Railway Co. 265 U.S. 274 (1924) 24, 27, 29

Wadley Southern Railroad Co. v. Georgia, 235 U.S. 651 (1951) 18

Yakus v. United States, 321 U.S. 414 (1944) 14, 17

State Cases

Cochran v. Black, 249 Ark. 362, 400 S.W.2d 280 283 (1966) 14

Dal Maso v. Board of Commissioners of Prince George's County, 182 Md. 200, 34 A.2d 464 (1943) 14

Earle v. Zoning Board of Review, 191 A.2d 1611 (R.I. 1963) 20

Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970) 41

Morton v. Mayor and Council of Clark Township, z102 N.J. Super. 84, 245 A.2d 377 (1968) 16

Vlahos Realty Co., Inc. v. Little Boar's Head, 101 N.H. 460, 147 A.2d 257 (1958) 45

Federal Statutes:

28 U.S.C. § 1254(1) (1966) 3

28 U.S.C. § 1331(a) (1966) 9

State Statutes:

Constitution of Georgia (Article III, Section VII, Paragraph XXII) [Georgia Code § 2-1923] 4

"Home Rule for Counties" Amendment, article 15, § 2-8402 et seq 5

Georgia Code Annotated

§ 69-1211. (municipalities & unincorporated county land) 43, 44

State Statutes **Page**

Zoning Resolution of Gwinnett County 3, 15, 44

Other Sources:

Note, Ad Hominem Treatment of Zoning Problems, 119 U. Pa. L. Rev. 992 (1961) 45

Bentham, Theory of Legislation, "Principles of the Civil Code," Dumont, ed. Hildreth, trans. (1964) 39

Davis, Administrative Law Treatise §§ 15.01, 15.10 (1958) 26

Davis, A System of Judicial Notice Based on Fairness and Convenience in Perspectives of Law, 69, 76-77 (1964) 33

Note, Exclusionary Zoning and Equal Protection, 84 Harv. L. Rev. 1645 (1971) 41

Feiler, Metropolitanization and Land-Use Parochialism Toward a Judicial Attitude, 69 Mich. Law Rev. 655 (1971) 38

Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv. L. Rev. 1165 (1965) 38

O. W. Holmes, The Common Law 37 (M. Howe ed. 1963) 41

Sager, "Tight Little Islands" Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan. L. Rev. 767 (1969) 41

Thayer, Preliminary Treatise on Evidence, 308 (1898) 33

Wigmore, Vol. 9, §§ 2587-68 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

SOUTH GWINNETT VENTURE, a Partnership Composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green,

Petitioner,

versus

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually and as Chief Building Inspector of Gwinnett County,

Respondents.

ROCKBRIDGE ASSOCIATES, LTD., a Georgia Limited Partnership,

Petitioner,

versus

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually and as Chief Building Inspector of Gwinnett County,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The petitioners, South Gwinnett Venture, a partnership composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green, and Rockbridge Associates, Ltd., a Georgia Limited Partnership, respectfully pray that a writ of certiorari issue to review the

opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cases on March 14, 1974.

OPINIONS BELOW

The opinion of the United States District Court is reported in *Rockbridge Associates, Ltd. v. Pruitt*, 341 F. Supp. 703 (N.D. Ga. 1971). A copy of this opinion appears as Appendix A hereto. On appeal, the Court of Appeals for the Fifth Circuit, reversed and remanded in its opinion reported in *South Gwinnett Venture v. Pruitt*, 482 F.2d 389 (5th Cir. 1973). A copy of the opinion appears as Appendix B hereto. On December 3, 1973, the Court of Appeals for the Fifth Circuit, on its own motion, ordered a rehearing en banc; the memorandum order is reported in *South Gwinnett Venture v. Pruitt*, 487 F.2d 1333 (5th Cir. 1973). A copy of the said order appears as Appendix C hereto. On rehearing en banc, the Court of Appeals for the Fifth Circuit, per Judge Coleman, reversed its prior decision in the case and on March 14, 1974 affirmed the judgment of the District Court. Judge Wisdom and Judge Ingraham dissented and filed a separate opinion. The opinion of the Court of Appeals for the Fifth Circuit, on rehearing en banc, is reported in *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir. 1974). A copy of said opinion appears as Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 14, 1974.

Jurisdiction to issue the writ is invoked pursuant to the provisions of Title 28, United States Code § 1254(1), which provides in relevant part that cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment.

QUESTIONS PRESENTED

1. Whether consideration of petitions for rezoning individual tracts of land on a case-by-case basis is an exercise of administrative discretion so inherently adjudicatory in nature that a zoning authority empowered to make such a decision should be constitutionally required to adhere to concepts of minimal due process.

2. Whether the Gwinnett County, Georgia Zoning Commission violated fundamental fairness and the minimal requirements of Due Process when

(a) it failed to prescribe standards by which petitioners' rezoning applications would be judged,

(b) it made extensive use of *ex parte* information to reach its decision without advising petitioners of what evidence was being considered, without allowing them to cross-examine witnesses or rebut or explain adverse testimony, and

(c) it failed to reveal any findings of fact to support its conclusion that petitioners' request must be denied.

3. Whether the protection of private property rights is an interest so deeply rooted in our social structure and fundamental to the stability of our society that the deprivation from an individual requires that full constitutional procedural due process be provided in adjudicatory zoning proceedings to ensure that the Commission's regulatory exercises of its police powers, which severely restrict a person's use of *his* property, comport with the Constitutional mandate that such controls be reasonably related to the public health, safety, welfare and morals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Georgia, Article III, Section VII, Paragraph XXII [Georgia Code § 2-1923], provides:

> "The General Assembly of the State shall have authority to grant the governing authorities of the municipalities and counties authority to pass zoning and planning laws whereby

> such cities or counties may be zoned or districted for various uses and other or different uses prohibited therein, and regulating the use for which said zones or districts may be set apart, and regulating the plans for development and improvements on real estate therein."

The "home rule" portion of the Constitution of Georgia [Georgia Code § 2-8402] is set forth in Appendix E.

The Zoning Ordinance of Gwinnett County, Georgia insofar as material here, appears as Appendix F hereto.

STATEMENT OF THE CASE

In these civil actions in Equity for declaratory and other appropriate relief based on allegedly unconstitutional proceedings conducted by the Zoning Commissioners and Building Inspector of Gwinnett County, Georgia, in violation of petitioners' Fourteenth Amendment rights, petitioners seek a Writ of Certioriari to the United States Court of Appeals for the Fifth Circuit to review the affirmation by that court of the dismissal of their suits by the District Court for the Northern District of Georgia, Atlanta Division.

ROCKBRIDGE ASSOCIATES, LTD.

This petitioner is a Georgia limited partnership and the owner of a modest tract of land in Gwinnett County, Georgia, located in the suburban region im-

mediately outside the City of Atlanta. One portion of petitioner's property is presently zoned R-85 (residential); the other is zoned C-2 (commercial). In June, 1970, Rockbridge Associates, Ltd. (hereinafter "Rockbridge") applied to the Gwinnett County Planning Commission to have the property rezoned to an R-M (apartment) classification. The Planning Commission, a body of land use experts specifically appointed to advise and assist the local authority in making planning and zoning determinations, held a hearing concerning the matter on July 2, 1970, and subsequently recommended approval of its request for rezoning.

On August 25, 1970, the Gwinnett County Board of Commissioners [respondents in this case] conducted a public hearing on the application at which time members of the community were urged to express their views concerning the proposition. Rockbridge presented its rezoning proposal together with the previously approved site development plan and other pertinent data. A delegation of persons from subdivisions near its property was present at the meeting and voiced opposition to the rezoning. At the close of the hearing, respondent Commissioner Gunnin moved to table decision on the matter for two weeks so that he could obtain additional studies and consult with the County Engineering Department. In the days following the hearing, the commissioners held *ex parte* conversations with numerous individuals opposed to the change, many of whom did not attend the public meeting, and received written objections from several other nonattenders. Presumably, respondent Gunnin and other commissioners consulted with the County Engineering and Water Departments to obtain information concerning sewage treatment, water availability, and

road conditions as well. However, the commissioners refused to disclose the content of the *ex parte* discussions and likewise which, if any, of the engineering data they considered determinative or relevant to their ruling on the requested rezoning.

The meeting to decide the question was held September 9, 1970. The respondents refused to follow the recommendation of the Planning Commission and denied the application for rezoning. The respondents in denying the application *concluded*, inter alia, there was insufficient water, inadequate sewage facilities, inadequate roads, and inadequate schools in the area, but *offered no proof whatsoever to support these conclusions.* Respondents further noted, somewhat paradoxically, that a large amount of R-M zoned land in the immediate area was *un*developed, and therefore, there was no need for additional R-M zoned property. Finally, and more candidly perhaps, respondents noted that the petitioners' tract of land was located between two residential areas and "would seriously affect them."

SOUTH GWINNETT VENTURE

This petitioner is also a partnership which owns a different tract of land in Gwinnett County, Georgia, located in the suburban region immediately outside Atlanta. In September, 1970, petitioner applied to the Gwinnett County Planning Commission to have the zoning classification changed from R-85 (residential) to R-M (apartment). The Planning Commission held a hearing concerning the matter on October 15, 1970, and subsequently recommended approval of the request for rezoning.

On November 24, 1970, the respondent Gwinnett County Commissioners conducted a public hearing on the application at which time members of the community voiced opposition to the plan for rezoning. At the close of the hearing, the recommendation of the Planning Commission was rejected and the application for rezoning was denied. Respondents listed insufficient water, inadequate sewage facilities, inadequate roads and schools, plus the observation that there was already a large amount of *un*developed R-M zoned land in the immediate area as its "reasons" for the decision. However, no evidence whatsoever was disclosed and no attempt whatsoever was made to substantiate any of these conclusory statements.

Petitioners raised the following objections to respondents' *procedure* in both cases:

(1) The criteria upon which these decisions were allegedly based were not promulgated in any county zoning ordinance, and to this day the standards which respondents used to reach the decisions are unknown to the public;

(2) The precise facts which the Commission relied on in reaching the decisions were not, and have never been disclosed to petitioners, who have never had an opportunity to rebut or explain presumably adverse information collected *ex parte* by the commission, or to cross-examine witnesses who may have supplied evidence in opposition to petitioners' request, and thus respondents' decision was not based on competent evidence establishing that the proposed rezoning was inconsistent with the objectives of the county resolution; and

(3) Therefore, the decision was arbitrary, capricious, and amounted to a taking of property without due process in that it *arbitrarily* interfered with the petitioners' rights in and use of its property, and *arbitrarily* deprived petitioners of a major portion of the value of their property.

Petitioners brought a civil suit in Equity for declaratory and other appropriate relief, alleging denial of due process and equal protection of the law under the Fourteenth Amendment. Jurisdiction was alleged under 28 U.S.C. § 1331(a), as a case arising under the Constitution of the United States.

Petitioners prayed for an order of the court declaring those portions of the Gwinnett County Zoning Ordinance and applicable zoning maps pertaining to their property be declared unconstitutional; they further prayed for an order of the court that respondent Herrington, in his official capacity as Chief Building Inspector of Gwinnett County, issue petitioners a building permit for the construction of apartments upon subject property.

The District Court for the Northern District of Georgia, Atlanta Division, took jurisdiction, but dismissed the suit holding that a decision of this nature by the local zoning authority is an exercise of judgment *legislative* in character, and thus beyond the control of judicial power. Petitioners appealed to the Court of Appeals for the Fifth Circuit which initially reversed the judgment of the District Court, holding, inter alia, that:

> "The adoption of a legislative plan for the entire community must be distinguished from

> the treatment which a specific tract of land receives when its owner petitions from reclassification under that plan * * * consideration of that petition is an exercise of legislative power in a case-by-case *adjudicative* setting." (emphasis added)

Having distinguished the adjudicative decision inherent in tract rezoning from the legislative action of adopting a comprehensive zoning plan, the court held that henceforth the zoning commission would be required to adhere to minimal concepts of due process when conducting *adjudicatory* zoning proceedings, citing a long line of precedents in this Court which condemned similar arbitrary administrative action.

Eight months after the opinion was issued, the Court of Appeals for the Fifth Circuit decided on its own motion to rehear the case en banc, without the benefit of oral argument, and this time reversed its earlier position and reinstated the judgment of the District Court, conceiving that opinion to say, inter alia, that it was not the function of the federal district courts to serve as zoning appeal boards; that the decision of local zoning authorities is an exercise of judgment legislative in character; and that such decisions are subject to judicial control only if arbitrary or if interested parties have been denied procedural due process. Judges Wisdom and Ingraham dissented and referred to their opinion in the prior Fifth Circuit decision upholding petitioners' claims.

Petitioners seek a writ of certiorari on the ground that they *have* been denied constitutionally guaranteed procedural due process in an *adjudicatory* administrative proceeding.

REASONS FOR GRANTING THE WRIT

I. When a Local Zoning Commission Considers Requests From Individual Landowners for Amendments to its Comprehensive Zoning Ordinances on a Case-by-Case Basis, and Exercises Discretionary Powers by Approving Some Applications and Disapproving Others, it Performs a Purely Adjudicatory Function, and Denial of Procedural Due Process in Such Administrative Proceedings Violates the Due Process Clause of the Fourteenth Amendment to the Constitution.

This case challenges the "settled law" in the Fifth Circuit, reiterated in the opinion of the court below, that all decisions made by a local zoning commission, usually composed of not more than five members in the community, are essentially "legislative" in character, and thus no viable distinction can be made between its functions involved in the adoption of a comprehensive zoning plan and those exercised in deciding whether or not to grant or deny a petition by an individual property owner for reclassification of one tract of land already being regulated under an existing plan.

The practical consequence of this viewpoint is enormous. It means that because everything a zoning commission does is deemed to be "legislative," it can severely restrict land use in an area under its jurisdiction in a virtually arbitrary manner since its actions are cloaked from judicial review unless arbitrary, unreasonable or capricious. More importantly, it can act on a petition from an individual landowner seeking a change in the zoning on his property so it can be used in some way other than the usually severe re-

strictions permit, and deny the request for a good reason, an arbitrary reason, or no reason at all. Protected by the myth that it is always acting in a legislative capacity, the commission is allowed to make its decisions with absolutely no requirement that it state any reasons for whatever position it decides to take, and if it does give reasons, it does not have to provide any proof whatsoever to support the conclusions reached. Because all of its acts are seen as "legislative" respondent zoning commissioners are not bound to inform a petitioning landowner which facts, if any, it is using to consider its decision. It can use facts developed at a public hearing, or it can use facts outside the public record and unknown to the applicant, or it can just use *no facts at all.* Without the burden of any requirement to prove any of its conclusions, or be accountable in any way to facts which can be tested by the usual methods afforded by minimal procedural due process, such as confrontation and cross-examination, the zoning commission is allowed to make all of its decisions without having to explain or prove to anyone why any given decision was made. A decision wherein the facts are not stated is set free from *all* facts in that the answer to any complaint can always be that there were ample *secret* facts — thus the decisions become by definition *purely arbitrary*, i.e., not based on any facts at all.

The petitioners in this case think, first of all, that there is an important difference between the way a zoning commission functions when it promulgates a set of impersonal rules disposing of everyone's welfare impartially, such as a comprehensive land-use plan for the community, and the way it functions when it considers an application from an individual landowner for an amendment to the general land-use plan and

exercises a highly discretionary power by approving or disapproving such a request. The latter is a completely *judicial* function and all that petitioners ask is that when respondents act in their *judicial* capacity that they adhere to minimal concepts of constitutional due process; i.e., *state reasons and disclose the relevant evidence underlying whatever decision is made.*

The Fifth Circuit Court of Appeals held that this case presented no substantial federal question because it decided that judgments made by a local zoning commission are acts which are essentially *legislative* in character and are thus protected from judicial review unless they are arbitrary or capricious. 491 F.2d at 7. Petitioners vigorously dispute the notion that the process whereby respondent commissioners consider petitions for rezoning individual tracts of land on a case-by-case basis is in any way "legislative" and argue to the contrary that such decisions involve an exercise of administrative discretion which is highly adjudicatory in nature. This position is completely supported by a factual analysis of the proceedings conducted by respondent zoning commissioners, and by dissenting Judges Wisdom and Ingraham, who concluded that this case did indeed present a substantial federal question on the ground that respondents' failure to disclose any *evidence* whatsoever in support of their decision denying petitioners' application for a zoning reclassification with respect to its individual tract of land amounted to a violation of minimal procedural due process guaranteed by the Fourteenth Amendment in an *adjudicatory* administrative proceeding.

A. *The administrative or judicial function distinguished from the legislative function.*

The essentials of the "legislative function" are the determination of legislative policy and its formulation and promulgation as defined in binding rules of conduct. *Yakus v. United States*, 321 U.S. 414 (1944); *Cochran v. Black*, 240 Ark. 362, 400 S.W.2d 280, 283 (1966). In *Dal Maso v. Board of Commissioners of Prince George's County*, 182 Md. 200, 34 A.2d 464 (1943), the court defined it as "the formation and determination of future rights and duties," 34 A.2d at 466. Thus, the adoption of a policy declared by Congress and its definition of circumstances in which its command is to be effective — for example, Wage and Price controls as defined by the Cost of Living Council — constitutes the performance, in a constitutional sense, of a "legislative function." See *Opp Cotton Mills v. Administrator of Wage and Hour Division of the Department of Labor*, 312 U.S. 126 (1941). Similarly, when a state public service commission undertakes to set rates for a public utility, it is exercising a "legislative function." *Delaware Coach Co. v. Public Service Commission of State of Delaware*, 265 F. Supp. 648, 652 (D.Del. 1967). In this case, the Zoning Ordinance of Gwinnett County empowers the local zoning commission to set forth general rules and enact a comprehensive zoning plan for the entire community:

> [F]or the purposes of promoting the health, safety, morals, convenience, order, prosperity or the general welfare of the present and future inhabitants of Gwinnett County; . . . and for other purposes, all in accordance with a comprehensive plan for the development of the county . . . (Article I, The Zoning Resolution of Gwinnett County, Georgia.)

Petitioners do not dispute the fact that this power to lay down broad impersonal regulations for everyone's welfare is clearly a legislative function. See generally, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Diedrich v. Zoning Commission of D.C.*, 393 F.2d 666 (D.C. Cir. 1968). However, that is not the only grant of power which the resolution makes. In Article XVII, respondents are given the authority to amend the zoning provisions:

> This Resolution, including the Zoning Map of Gwinnett County . . . *may* be amended from time to time by the County Commissioners [after submission to the] County Planning Commission. . . .

This *discretionary* power, given to the zoning commission to approve or deny applications for amendments, particularly from individual property owners seeking a change with respect to one tract of land only, is clearly more akin to a judicial function.

This analysis has been supported by state courts and lower federal courts in similar zoning litigation; see, for example, *Donovan v. Clarke*, 222 F. Supp. 632 (D.D.C. 1963), where Judge Walsh noted:

> It is well established that the authority of the zoning commission is legislative [citing cases]. . . . Certainly the functions of the Commission in planning comprehensive zoning for the District of Columbia are legislative; but, it appears to this Court that *whenever the Commission acts on the petition of a resident for a change in the zoning of his property, it acts*

> *in a quasi-judicial capacity.* . . . (222 F. Supp. at 634.) [emphasis added].

Likewise, in *Morton v. Mayor and Council of Clark Township*, 102 N.J. Super. 84, 245 A.2d 377 (1968), it was held that a municipal governing body's approval or disapproval of a recommendation by the board of adjustment is a "quasi-judicial function" and not a "legislative function." 245 A. 2d at 381. The court wrote:

> A committee of its members had viewed the premises, and they had heard the parties in favor of and in opposition to the application. *They acted judicially, and adopted one of only two courses open to it, namely to grant or deny the application.* 245 A.2d at 384 (emphasis in original)

Thus, the chief distinction between a "legislative function" and a "judicial function" is that the former sets up rights or inhibitions general in character, whereas the latter interprets, applies, and enforces existing law as related to persons amenable thereto.

Other recent cases, both state and federal, indicate a strong trend in the law toward distinguishing the administrative or quasi-judicial activities of a zoning commission from exercises of its more general legislative powers. In *Citizens Association of Georgetown, Inc. v. Zoning Commission of D.C.*, 477 F.2d 402 (D.C. Cir. 1973), Judge Bazelon noted that while "It is true that the Zoning Commission is a quasi-legislative body . . . there are important elements of a non-legislative nature to the Commission's decisions." 477 F.2d at 408.

B. *It is well settled that a court may review an essentially administrative or judicial determination made by a zoning authority which deeply involves rights guaranteed by the Federal Constitution.*

There is an inherent right of appeal from an administrative decision where constitutional rights are involved. *Yakus v. United States*, 321 U.S. 414 (1944); *Southern Railway Co. v. Virginia*, 290 U.S. 190 (1933); *Crowell v. Benson*, 285 U.S. 22 (1932); *Bluefield Waterworks and Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923). The protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted, including an act of any subordinate instrumentality of the state exercising delegated legislative authority, such as an order of a commission. *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571 (1919); *cf. Carlson v. Landon*, 342 U.S. 524, reh. den. 343 U.S. 988 (1952); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936). The constitutional right to judicial review has been considered particularly strong where the administrative action may result in a deprivation of constitutional rights to life, liberty, or property. See *St. Joseph Stock Yards Co. v. United States, supra; Jones v. Securities and Exchange Commission*, 298 U.S. 1 (1936); *Crowell v. Benson, supra; Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920).

The right to a judicial determination of the question of unconstitutional deprivation of property exists whether the deprivation is by a statute passed without a hearing or by administrative orders of a commission made after a hearing, and any party affected by such action is entitled by the due process clause to a judicial

review of the question whether he has been thereby deprived of a right protected by the Constitution. *Wadley Southern Railroad Co. v. Georgia*, 235 U.S. 651 (1915). Thus, in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), this Court held that a decision made by a local authority interpreting a zoning ordinance as it applied to an individual tract of land was judicially reviewable where the owner claimed that such determination deprived him of his property without due process of law. See 277 U.S. at 188-89. Again in *Donovan v. Clarke, supra*, the District Judge said:

> [i]t appears to this Court that whenever the Commission acts *on the petition of a resident for a change in the zoning of his property, it acts in a quasi-judicial* capacity, in that a determination must be reached on the *evidence* adduced and the applicable law, ever mindful of their responsibility to the interest of the community to protect the health, safety and welfare. *Such a determination is subject to review by the courts not on the merits of the issues presented, but as to whether the action was justified or was capricious, arbitrary, unreasonable or discriminatory. SUCH A REVIEW CAN ONLY BE ACCOMPLISHED WHEN THE DECISION OF THE COMMISSION CONTAINS FINDINGS OF FACT ON WHICH THE DECISION WAS BASED.* 222 F. Supp. at 634 (emphasis added).

Thus, petitioners contend that the Court of Appeals for the Fifth Circuit erred when it held that a proceeding to act of a request for a change in the zoning of an individual tract of land involves an exercise

of judgment only legislative in character, and clearly presents a proper question for review by this Court.

II. Respondents Violated Fundamental Fairness and the Minimal Requirements of Due Process and Denied Petitioners Equal Protection of the Law:

(A) When They Failed to Prescribe Standards by Which Petitioners Rezoning Application Would be Judged;

(B) When They Made Extensive Use of *Ex Parte* Information to Reach Their Decision Without Advising Petitioners of Precisely What Evidence Was Being Considered, or Allowing Them to Cross-Examine Witnesses or Rebut or Explain Adverse Testimony; and

(C) When They Failed to Disclose Any Findings of Fact or Reveal Any Evidence to Support Their Reasons for Denying Petitioners' Request.

Because rezoning proceedings held by respondents in cases of this type are actually judicial in nature, petitioners are entitled to the substantive and procedural safeguards guaranteed by the Due Process clause of the Fourteenth Amendment.

A. *The Gwinnett County Zoning Commission's failure to promulgate rules of decision or standards for determining the merits of an individual rezoning application constitutes a gross violation of substantive due process and a denial of equal protection of the law.*

Zoning laws and regulations must satisfy the requirements of the constitutional guarantees of due process and equal protection of the laws, Thus, this

Court has stated that in order to hold a zoning regulation unconstitutional as a violation of the due process of law or equal protection clauses of the federal constitution, it must appear "that . . . [the] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365. In another instance the test was stated as whether the ordinance "is so vague and ambiguous and so lacking in standards by which it may be interpreted and applied as to deprive them of due process of law and of the equal protection of the laws . . ." *Earle v. Zoning Board of Review*, 191 A.2d 1611 (R.I. 1963).

The trial court found as a matter of law that the Gwinnett County zoning resolution sufficiently set forth the objectives to be achieved by zoning and the standards which are to govern the decisions of the local zoning authority. Yet, when petitioners were served interrogatories and specifically asked which factors they considered in making their decision not to grant petitioners' application, they responded by listing thirteen criteria *which were not and have not been promulgated by any Gwinnett County Zoning ordinance.* Thus the standards used to reach their conclusion were completely unknown to petitioners prior to the hearing held to consider their applications, *and were revealed only after this litigation forced disclosure.* How could petitioners make an effective case to support their applications *when they did not know which factors the commission was going to take into account when deciding the case?*

Petitioners contend that the District Court and

the Court of Appeals misconceived the basic difference between *objectives* and *standards*. The Gwinnett County zoning resolution sets forth broad objectives[1] which go to the issue of justifying restrictions on land use in the interest of public health, safety, welfare and morals, *but in no way prescribes any standards for deciding individual cases*. This is probably because the theoretical scheme described in Appendix "G" never contemplated making amendments to the zoning ordinance on a piecemeal basis, but also perhaps because the criteria appear to shift from case to case, making publication unwise under the circumstances. Contrary to what the Court of Appeals concluded, an examination of the record indicates that no such criteria have ever been enacted.

This failure to promulgate standards permits the commission to decide a case on *any ground it chooses* and opens the door as wide as possible to possible abuses of discretion resulting in purely arbitrary decisions. The point is that if there are no criteria then decisions must *by definition* be arbitrary.

Here, the Gwinnett County zoning resolution contains broad general aims, bounded only by the vague limits of the public health, safety, welfare and morals. The purpose of the act is not to restrict land use per se, but rather to *promote* the *public* welfare through the mechanism of land use restrictions. Under this broad mandate, the zoning commission's discretion to decide what is best is left virtually unfettered and becomes enormously susceptible to abuse. For this reason pe-

[1] E.g., lessen congestion in the streets, secure safety from fire, panic and other dangers, etc.

titioners contend the Court of Appeals erred in its determination and maintain that such error presents firm ground for reversal of the court's decision.

B. *The Due Process clause of the Constitution prohibits the gathering of ex parte information by the respondents and the use of such evidence in the decision-making process WITHOUT affording petitioners an opportunity to confront and cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal of adverse findings deprives them of fundamental rights guaranteed by the Fourteenth Amendment.*

Petitioners specifically complain that the decisive evidence considered by the respondent zoning commissioners was *gathered secretly* sometime after the August 25, 1970 meeting,[2] and therefore is not competent to support the decision. The record clearly shows that respondent Gunnin requested and won approval for a continuance of the meeting in order that the commission might obtain additional studies and consult with the Gwinnett County Engineering Department.

This makes it equally clear that as of the conclusion of the meeting on August 25, 1970, the Commis-

---

[2] Exactly what constitutes a "hearing" is apparently nowhere fully defined in U.S. Supreme Court cases or in our history of Anglo-Saxon jurisprudence. However, the word does imply certain requirements of fairness including the right to know what evidence is being considered by the tribunal, to confront the opposing witnesses, to cross-examine. Not since the "Star Chamber" has secret evidence been considered to be consistent with fairness. This point is more fully developed hereinafter.

sioners were undecided and felt they needed to collect more information in order to tip the balance one way or the other; otherwise, there would be no need for the continuance, and the decision could be based on the discussions held at its meeting. Apparently, they did just that, for the Commission did not reconvene for more than two weeks, at which time it felt it had the necessary data in hand to reach a decision. It is impossible to escape the conclusion that not only did the commissioners travel well beyond the record developed at the August 25th meeting in order to gather *ex parte* information, but also that such information was crucial to the ultimate decision in the case. The District Court acknowledged these beyond-the-record excursions in the following passage:

> While some of the reasons for denying the requests were apparently the result of independent investigation by the Commissioners, this does not mean the decision is based on incompetent evidence or that plaintiff has been denied procedural due process. Since the commissioners were engaged in an exercise of legislative authority, it is not inconsistent with due process requirements for the Commissioners to make reference to reports of various county agencies. (341 F. Supp. 703, 106) [footnote omitted]

It is obvious from this excerpt that the reason the District Court felt that there was no harm done was *not* that the information was not relevant, and *not* that the information was not decisive, *but that such ex parte procedures were the privilege of a body carrying on a legislative function!* But as petitioners have argued in

considerable detail above, this action by the Gwinnett County Zoning Commission *was in fact the antithesis of a "legislative" function; the Commission here was not gathering information prior to enacting a broad rule for the general community,* cf. *Law Motor Freight v. C.A.B.*, 364 F.2d 139 (1st Cir. 1966), *it was adjudicating an individual request relating to a single parcel of land.* Therefore, petitioners contend that it was grossly improper for the Court of Appeals to sanction the use of unrevealed, untested, decisive *ex parte* information under these circumstances. See *Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); *United States v. Abilene and Southern Railway Co.*, 265 U.S. 274 (1924); *Interstate Commerce Commission v. Louisville and Nashville Railroad Co.*, 227, U.S. 88 (1913); *cf. Market Street Ry. v. Railroad Commission*, 324 U.S. 548 (1945).

To this day, petitioners do not know what the decisive information was, or whether it consisted of testimony or documents or both, or whether more weight was assigned to some factors than others. The Commission evidently felt it was unnecessary to make any findings of fact since it could simply dispose of the case by "legislative" fiat. Such an attitude displays utter contempt for the rules of fair play, not to mention a total disregard of its constitutional duty to justify use of restrictions as they apply to an individual parcel of land, if requested to do so. See *Nectow v. City of Cambridge, supra.* In addition, the position taken by the Court below on the problem of use of extra-record information under these circumstances is simply inconsistent with the long-standing precedents of this Court just cited.

However, in his specially concurring opinion in the court below, Judge Roney felt that despite what has just been said, petitioners were accorded minimal due process in this case, and he cited the views of the trial court and the dissenting judge sitting on the first panel of the Court of Appeals (which decided 2-1 in favor of petitioners) as supporting this position. Neither the opinion of the trial court nor the dissent in the first opinion in the Court of Appeals supports the conclusion that petitioners did receive minimal due process in this case. First the "reasons" referred to by the trial court were actually only *conclusory statements*, and the facts, if any, on which they were based have never been disclosed to petitioners, thereby depriving them of any chance to cross-examine witnesses or rebut or explain adverse testimony, and effectively precluding any meaningful review of the decision since the facts on which it was based are unknown.

Secondly, the dissent in the first opinion in the Court of Appeals did *not* say that petitioners had been afforded minimal due process; in its opinion, the burden was on petitioners to seek the facts, since respondents had no duty to provide any, simply because their decisions were seen to be "legislative" in character. Despite what Judge Roney said, petitioners have never been advised of or received the facts, especially the extra-record information supporting respondents' decision — the "more" to which Judge Roney admits petitioners are entitled.

Professor Davis has written that "No other major problem of administrative law surpasses in practical importance the problem of use of extra-record information *in an adjudication*. The nub of the central prob-

lem is to reconcile the needs of procedural fairness with the need for full and free use of whatever expertness the agency may have, including the kind of understanding that is based on an inseparable mixture of "experience and information." Davis, Administrative Law Treatise § 15.01 (1958). Solution of the problem involves the reconciliation of "expertness" with the most essential ingredient of a fair hearing—the opportunity to know and meet the materials on the other side. Davis says the true distinction is between finding facts about the parties and determining questions of law and policy and discretion: "The cardinal distinction which . . . governs the use of extra-record facts by . . . agencies is the distinction between legislative facts and adjudicative facts. *When an agency finds facts concerning the immediate parties* [*it is*] *performing an adjudicative function*, and the facts are conveniently called "adjudicative facts." When an agency develops law or policy it is acting legislatively. Adjudicative facts relate to the parties, their activities, their properties, while legislative facts are ordinarily general and do not concern the immediate parties.

Thus, the full use of extra-record facts is to be encouraged, *except adjudicative facts specifically in dispute*, and parties should then be allowed an appropriate opportunity to meet the facts thus noticed. Obviously, more procedural protection is needed for adjudicative facts than legislative facts, and more for facts *directly affecting the decision* than for those that bear only peripherally on the decision. Davis concludes that when the facts are (1) *adjudicative*, (2) *disputed*, and (3) *critical*, *nothing less than submission through evidence, subject to cross-examination and rebuttal will normally suffice. Id.* § 15.10.

This Court has had numerous occasions to speak to this subject. In a long line of thoroughly reasoned decisions, it has worked out a doctrine, which guarantees broader procedural protection than Professor Davis argues for.

In *Interstate Commerce Commission v. Louisville and Nashville Railroad Co.*, 227 U.S. 88 (1913) the unanimous Court said:

> [t]he Commissioners *cannot act upon their own information as could jurors in primitive days.* All parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, *the manifest deficiency could always be explained on the theory that the Commission had before it extraneous unknown but presumptively sufficient information to support its finding.* (emphasis supplied) 227 U.S. at 93-94.

Here, this Court *specifically rejected* the idea that secret evidence (i.e., "extraneous, unknown but presumptively sufficient information) is sufficient to support an essentially adjudicative determination.

In *United States v. Abilene and Southern Railway Co.*, 265 U.S. 274 (1924), this Court made a clear

and concise statement of the rule: ". . a finding without evidence is beyond the power of the Commission. . . . *Nothing can be treated as evidence which is not introduced as such.*" 265 U.S. at 288 (emphasis added).

Commenting on *ex parte* evidence in *Morgan v. United States*, 304 U.S. 1 (1938), reh. den. 304 U.S. 23 (1938), this Court said:

> Congress, in requiring a "full hearing", had regard to judicial standards—not in any technical sense, but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature. If in a equity cause, a special master . . . permitted the plaintiff's attorney to formulate the findings on the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing . . .
>
> [t]hat is more than an irregularity in practice; it is a vital defect. 304 U.S. 1, 19-20, 22.

Thus, in the *Morgan* case this Court held that in administrative proceedings of a quasi-judicial character, the liberty *and property* of citizens must be protected by fair and open hearing; that such a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party, and to meet those claims.

Accord, Ohio Bell Telephone v. Public Utilities Commission, 301 U.S. 292 (1937).

The doctrine developed by this Court in *Louisville & Nashville, Abilene & Southern, Morgan* and *Ohio Bell* concerning the permissible uses of extra-record information have been applied to an extremely wide variety of cases by the lower federal courts. The Seventh Circuit has applied full procedural due process to an anti-trust case involving infringement of trademarks and unfair competition. See *Smith v. Dental Products Co.*, 168 F.2d 516 (7th Cir. 1948). "Here there was no opinion, no memorandum of fact and law but only the ultimate finding." [citing *Ohio Bell; U.S. v. Abilene & Southern Ry.;* and *Morgan.*] The rationale has been applied to bankruptcy proceedings in the Third Circuit, see *In re Aughenbaugh*, 125 F.2d 887 (3rd Cir. 1942), and to workmen's compensation award proceedings, *Brown-Pacific-Maxon Co. v. Turner*, 255 F.2d 611 (7th Cir. 1958). See also *Heckler v. Shepard*, 243 F. Supp. 841 (D. Idaho 1965) [loyalty oath proceeding]; *TWA v. Hughes*, 308 F. Supp. 679 (D.N.Y. 1969) [anti-trust suit]; *In re Bowen*, 58 F. Supp. 286 (D. Pa. 1944) [bankruptcy].

The Court of Appeals for the District of Columbia has applied the doctrine to *zoning cases*, in marked contrast to the position taken by the Fifth Circuit in this case. In *Shenk v. Zoning Commission of the District of Columbia*, 440 F.2d 295 (D.C. Cir. 1971), a case which the Fifth Circuit alluded to in the opinion below but which does *not* support its holding in this case, the Court of Appeals for the District of Columbia held that although the action of the zoning commission is entitled to a presumption of validity when a com-

plainant makes a factual showing that the action is arbitrary, that action cannot be sustained unless the commission puts forward *some basis of fact* and law to justify the action as consistent with reasonableness. 440 F.2d, at 297, 298. *Accord, Citizens Association of Georgetown, Inc. v. Zoning Commission of the District of Columbia*, 477 F.2d 402 (D.C. Cir. 1973), where the District of Columbia Court of Appeals held that the need for judicial review of administrative actions required the Zoning Commission to spell out its reasoning in reaching a decision so that the Court would not have to speculate as to the basis for the commission's conclusions. 477 F.2d at 408.

In *Robey v. Schwab*, 307 F.2d 198 (D.C. Cir. 1962), the same court held that in order to support its conclusions the zoning authority must make basic findings of fact and, although such findings need not amount to an exhaustive summation of all of the evidence, the agency must state the *facts* which persuaded it to arrive at its decision. 307 F.2d at 202. That same decision also held that a mere reiteration of the zoning regulations insofar as they set forth conditions necessary for allowance of a request would not satisfy this requirement. 307 F.2d at 201. In *Hot Shoppes, Inc., v. Clouser*, 231 F. Supp. 825, *aff'd* 346 F.2d 834 (D.C. Cir. 1965), the bare statement made by the zoning authority that it had sufficient *ex parte* information to support its decision *did not* raise a presumption that the authority had facts to support its conclusion, where it did not set forth the facts upon which it relied in reaching its conclusion. Finally, in the *Shenk* opinion it was held that insufficient governmental facilities such as roads, schools and sewage treatment facilities *was not* a valid objection to rezoning for apartments,

and that the action of the Zoning Commission was *arbitrary* where eleven previous cases were granted over similar objections.[3]

---

[3] In the instant case, Exhibit "B" to respondents' answers to petitioners' First Interrogatories indicated that between August 1968 and August 1970, of 30 applications by developers for rezoning in Gwinnett County, 19 were approved, 9 were disapproved, and 2 were withdrawn. More interesting was the trend revealed by the yearly breakdowns:

	Approved	Disapproved	Withdrawn
Year 1	15	0	0
Year 2	3	5	1
Year 3	1	4	1

It is difficult to avoid the conclusion that until August 1969, the county welcomed developers with open arms, and later, as resistance from current residents started to mount, a quota system was imposed. Whether any of these decisions were made solely with respect to the land involved and matched against the constitutional standards requiring that such measures be reasonably related to the public health, safety, welfare and morals is a highly speculative question.

As was pointed out earlier, a zoning commission allowed to use its "unfettered discretion" when no concrete standards for adjudicating cases have been prescribed, becomes a sort of potential breeding ground for "graft and corruption"; this situation naturally occurs whenever there is an oversupply of qualified applicants, which causes the local governing body to institute some sort of a quota system. As petitioners have pointed out in the "History of Zoning" in Appendix G attached hereto, the early idea of a comprehensive plan in zoning has gradually evolved into a quota system for controlling development. The net result is that on parcels of land which are virtually indistinguishable, some applications are approved and others are not. The only way to ensure that the legitimate public interest is maintained in these proceedings is to require that full due process be granted at all zoning hearings.

Thus, the instant case indicates that there is a clear split of opinion on the issue between the Court of Appeals for the Fifth Circuit and the Court of Appeals for the District of Columbia, presenting an important question of federal law which should be settled by this Court.

Despite the clear procedural basis for the claim in this case, respondents have throughout the course of this litigation insisted that if the court grants relief to petitioners, and holds that zoning commissions acting on applications to rezone individual tracts of land must henceforth state facts and reasons in support of whatever decision is reached, the floodgates will be opened to a deluge of similar cases in the lower federal courts. Nothing could be further from the truth.

Petitioners agree that a federal court should not sit as "super zoning board" and be asked to substitute its judgment for that of the local authority; the claim here goes not to the merits but rather the procedures employed in the decision making process in this case. All the local zoning commission has to do is adhere to concepts of minimal due process embodied in the Fourteenth Amendment to the United States Constitution when deciding the merits of these applications on a case-by-case basis. This simply translates into the fair requirements that the zoning commissioners base their decisions only on evidence contained in the record adduced at the statutory hearing, and thereafter state their reasons for whatever determination is made. There is no reason to assume that a flood of similar litigation will ensue in the federal courts if this Court makes such a rule of law; that will not happen as long as the local zoning authorities follows these few basic

constitutional precepts of procedural due process. Federal courts have not in the past, nor have they begun now to express any opinion on the merits of decisions made by local zoning authorities, as long as they are not completely arbitrary.

Finally, petitioners' contentions concerning use of extra-record information are well supported by numerous other authorities. Rule 2-01 of the Proposed Federal Rules of Evidence, entitled "Judicial Notice of Adjudicative Facts" provides (e) OPPORTUNITY TO BE HEARD. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed." 46 F.R.D. 161 (1968). The Advisory Committee's Note on the rule states "Basic considerations of procedural fairness" as the rationale. *Id.* at 204. Furthermore, the treatise writers, both old and modern, have long favored admission of evidence in disproof of facts of which judicial notice is taken. See e.g., Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore §§ 2587-68; Davis, *A System of Judicial Notice Based on Fairness and Convenience, in Perspective Law*, 69, 76-77 (1964).

C. *The respondents failure to state findings of fact to support its conclusion precludes effective judicial review of the decision, and thereby deprives petitioners of procedural fairness required by the Constitution.*

The minutes of the Gwinnett County Commissioners' meeting indicate that petitioners' rezoning applications were denied for the following reasons: 1. Insufficient water and inadequate sewage facilities in the

area; 2. Inadequate roads — road arteries are already congested; 3. Inadequate schools — already overcrowded; 4. Located between two prime residential areas and would seriously affect them; 5. Large amount of RM zoned land is undeveloped in the immediate area.

When asked the facts underlying these reasons, the Board's total reply was simply "The decision of the Board of Commissioners was not based on any arbitrary findings but was based on a factual situation and the facts were readily available to the Board of Commissioners for them to make a determination." *Id.* Fantastic: no facts and figures or offers of proof whatsoever to indicate why the roads and schools are allegedly inadequate; no reference to any sewage, road, or water report by the county engineering department, although respondent Gunnin claimed he could not reach a decision until he adverted to such information — and now petitioners are supposed to take it on faith that the decision was not arbitrary. Petitioners contend that the Zoning Commission's failure to reveal any findings of fact to support its decision in this case violates not only the rules of fair play embodied in the due process clause of the 14th Amendment, but also well-established principles of sound judicial policy.

The rationale for requiring specific findings of fact was elucidated best by the late Mr. Justice Frankfurter in this Court's now famous opinion in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), an SEC reorganization order case:

> *[T]he courts cannot exercise their duty of judicial review unless they are advised of the*

> *considerations underlying the action under review . . . [t]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.* 318 U.S. at 94 (emphasis added).

The *Chenery* rule has been applied to the widest variety of cases imaginable, in virtually every Federal Circuit Court of Appeals. See, for example, *Florida Power Corp. v. FPC*, 425 F.2d 1196, 1203 (5th Cir. 1970); *Beck v. SEC*, 413 F.2d 832 (6th Cir. 1969), modified on other grounds, 430 F.2d 673 (1970); *Industrial Union Dept. v. Barber-Coleman Co.*, 348 F.2d 787 (D.C. Cir. 1965) [labor case]; *Tejeda v. U.S. Immigration & Naturalization Service*, 346 F.2d 389 (9th Cir. 1965) [inadequate findings to justify deportation].

Several times in recent years, this Court has felt compelled to restate the rule to reluctant or reticent fact-finding authorities. *Goldberg v. Kelly*, 397 U.S. 254 (1970), made it incumbent on welfare agencies to state findings and reasons: "In such cases, the decision maker need not file a full opinion . . . but should state the reasons for his determination and indicate *the evidence he relied on.*" 397 U.S. at 271 (1970) (Emphasis Added). Again in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), "a tenant would have considerable difficulty effectively defending against such an admittedly illegal eviction if the Authority were under no obligation to disclose its reasons." Finally, in *Garner v. Louisiana*, 368 U.S. 157 (1961), the Court invoked its sparingly used "no evidence" rule and applied the rationale to a case involving deprivations of liberty: ". . . there is no way by which an appel-

late court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence when that evidence is unknown. Such an assumption would be a denial of due process." 369 U.S. at 173.

Zoning litigation has been replete with cases demanding that administrative bodies make findings of facts and give reasons for their decisions. See, e.g. *Robey v. Schwab*, 307 F.2d 198 (D.C. Cir. 1962); *Hot Shoppes Inc., v. Clouser, supra.*

In summary, petitioners contend that in adjudications of substantial importance, such as decisions involving a citizen's property, the desirability of reasoned opinions is clear. Their preparation affords a safeguard against arbitrary or careless action, and the resulting body of precedents makes for consistency and predictability, two attributes cherished not only by the fathers of modern zoning, but by all of civilized society as well.

III. The Protection Of Private Property Rights Is An Interest So Deeply Rooted In Our Social Structure And So Fundamental To the Stability Of Our Civilization That Procedural Due Process In An Adjudicatory Zoning Proceeding Is Required To Ensure That Respondents' Exercise Of Its Regulatory Police Power, Which Severely Restricts An Owner's Use Of His Property, Comports With The Constitutional Mandate That Such Controls Be Reasonably Related To The Public Health, Safety, Welfare And Morals.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any

person of life, liberty, *or property* without due process of law." The Fifth Amendment states that private property shall "not be taken for public use, without just compensation," and the Fourteenth Amendment has been interpreted to impose the same obligation on the states. See, *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897). Accordingly, when the government seeks to "take" private land for a new postoffice or a park or an airport, it resorts to the power of eminent domain: the property is taken through condemnation and the owner is entitled to "just compensation." Under the police powers and other regulatory powers, however, government may impose restrictions on property that produce a substantial diminution in its value; and this Court has held that government need not compensate the owner for losses that are incidental consequences of valid regulations. See, e.g., *Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926); *Goldblatt v. City of Hempstead*, 369 U.S. 590 (1962). The limits of the police power are extremely difficult to pin down. Nevertheless, in the context of zoning, *Euclid* holds that some loss of value resulting from restrictions is constitutionally noncompensible as long as the regulation is reasonably related to the public health, safety, welfare and morals. Thus, residential zoning is not invalidated by the *bare* fact that if the property were available for business purposes its market value would be greatly enhanced, and will be upheld *unless the decision is arbitrary.* See, *City of St. Paul v. Chicago, St. Paul, M. & O. Ry.*, 413 F.2d 762 (8th Cir. 1969); *Leventhal v. District of Columbia*, 100 F.2d (D.C. Cir. 1939). However, it is clear that the degree of public *necessity* relates to how far the legislature can reduce a landowner's property rights without there being a taking; the reduction in an owner's land value

must benefit the public health, safety, welfare or morals in order to be constitutional. In zoning litigation, the lines of demarcation are drawn between the rights of the individual landowners and the police powers of the state; and while every owner has a duty to step aside in the public's interest, there is a corollary right not to be pushed aside when the public's interest is not at stake.[4] Petitioners contend, therefore, that a property owner should be able to advance in court the inquiry whether his property rights are being interfered with for a legitimate purpose. *The question then becomes not whether the restrictions are so severe as to amount to a 5th Amendment "taking", but instead whether the limitations imposed, however slight, can be justified by the public interest, i.e., health, safety, welfare and morals. If it cannot be so justified, then the restriction is simply an unconstitutional restraint on the owner's fundamental right to use his land in any way which the Constitution permits.* Property rights are after all, *individual* rights, i.e., the right of an *owner;* not the right of the property.

The correctness of the term "fundamental right" in this context cannot be overstressed. The concept of individual ownership of property goes to the very structure of society itself and is deeply rooted in universal sentiments of justice. According to the philosopher David Hume, no lasting societal association would be possible if people might "trespass" against one another.[5] Jeremy Bentham refined Hume's philosophy,

[4] See, M. Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude,* 69 Mich. L. Rev. 655, 688 (1971).

[5] See Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 Harv. L. Rev. 1165 (1967).

to suggest that a high level of productivity in society depends on the rules of forebearance which assure to every person who invests or labors that he will share in the fruits of his investment or labor to a predictable extent.[6] Thus, the intensity of productive activity is directly related to the extent that each member of society is willing to stick by the rules. Property, according to Bentham, is regarded as the collection of rules which are presently accepted as governing the exploitation and enjoyment of resources. His view regards property as a human right such that a human being's interest in his property becomes an extension of himself. This view leads Bentham to conclude that men will not labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings. Thus, any *unpredictable redistribution* is potentially destructive of society's material well-being, and is always something of a disappointment to the expectations which Bentham described as the essence of property.

It is then the principle that *any arbitrary or capricious redistribution* imposed by public authority *contributes to the disintegration of society* which lies at the heart of the Fourteenth Amendment's prohibition against a taking of property without due process of law. *Our concept of property, with its attendant sense of expectations, is so completely interwoven into our social fabric that it becomes incumbent on the local zoning authority to administer its power scrupulously.*

---

[6] Bentham, Theory of Legislation, "Principles of the Civil Code," Dumont, ed. Hildreth, trans. (1864).

To the extent that a landowner is willing to question the validity of regulations as they apply to his property, the zoning authority has a public duty to come forth and present its case, with facts and reasons, in a full and open hearing, in order to avoid the disincentive effects which otherwise result from apparently arbitrary and unjustified distribution decisions.

No five man commission should be able to sit with its arms folded and refuse to intelligently justify its zoning decision; presumably only the commission has access to all the facts which led it to its conclusion, and if they are not disclosed to the property owner, he stands virtually no chance of being able to successfully challenge this "legislative" fiat.

The most common zoning regulation is the *use* restriction, of course; this means the government has decided to "take" some uses from the landowner, while leaving others intact. It also gives courts a rationale for saying that there has been no "taking" when a piece of property can still be put to *some* use, but the constitutional validity of any such holding rests on the thin reed of assumption that all of the other possible but prohibited uses were taken with a concomitant increase in the general welfare, including the landowner's, naturally. Petitioners suggest that the Court should distinguish constitutional benefits from non-constitutional ones on the basis of who it is exactly that is being benefited. A measure benefits the public welfare in a constitutional sense, for example, if it is designed to ensure a pure water supply for the community, but not if it merely protects existing property values of a handful of surrounding neighbors at the

expense of one landowner,[7] or if its only purpose is to exclude persons of other economic classes from the area entirely[8] — a consideration having absolutely nothing at all to do with the characteristics of the land in question or the variety of uses it might be suitable for — again, usually at the expense of one or two owners. Furthermore, a "taking" which severely restricts an owner, i.e., where only one of several possible uses is permitted, which returns only a nominal benefit to the general community, should be examined extremely closely by a reviewing court. The valid exercise of the police power should not extend to grossly unequal bargains in which the public receives so little in return for exacting such a high price from a few landowners. This is precisely the sort of governmental activity which Holmes was adverting to when he condemned the society which finds it "necessary" to sacrifice individuals in the interest of the mass; clearly, a *civilized* government only imposes disproportionate hardships on its citizens when they cannot be avoided.[9] There is no indication of that circumstance in this case: no facts, no findings — just a take-it-or-leave-it conclusion. Such a position completely undercuts the policy behind the "taking" provisions of the Fourteenth Amendment and under the circumstances constitutes a blatant violation of due process guaranteed by the

---

[7] Note respondents' "reason" No. 4 for denying petitioners' request: "Located between two prime residential areas and would seriously affect them."

[8] See, Sager, *"Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 Stan. L. Rev. 767 (1969): see also, Note, *Exclusionary Zoning and Equal Protection,* 84 Harv. L. Rev. 1645 (1971); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

[9] O. W. Holmes, The Common Law 37 (M.Howe ed. 1963).

same constitutional provisions. Petitioners agree that the sheer cost of evaluating every individual "taking" involved in a legitimate zoning regulation makes cash compensation infeasible, and it understands that in lieu of that payment it receives part of the overall proportionate benefit distributed to the general community. At the same time, it must be insisted that the local zoning commission scrupulously administer its authority in accordance with the law so as not to infringe any more than is absolutely necessary on an individual landowners' interest in his real property. Both the Constitution and the strongest possible policy reasons demand it.

IV. The Doctrine of Exhaustion Of Administrative Remedies Is Not Applicable To The Facts Of This Case, Where The State Provides No Machinery To Protect The Rights Of A Landowner Guaranteed To Him By The Fourteenth Amendment To The Constitution Of The United States.

In the dissenting opinion in the first decision of the Fifth Circuit Court of Appeals in *South Gwinnett Venture v. Pruitt*, Judge Bootle raised the issue of primary jurisdiction, or more precisely, the doctrine that a litigant be required to exhaust his administrative remedies before appealing to the courts for protection and enforcement of his constitutionally guaranteed rights. 482 F.2d at 392. (Petitioners of course, had exhausted their remedies before the respondents, members of the Gwinnett County Zoning Commission.) This argument naturally assumes that such an administrative body or bodies exist, and that they are empowered to grant the relief which petitioners initially prayed for in their complaint.

In Judge Bootle's view, the proper administrative agency in this instance would be the Zoning Board of Appeals for Gwinnett County, Georgia. Assuming that this agency possesses sufficient expertise to pass judgment on zoning matters, the question remains, does the Zoning Board of Appeals have the *power* to grant the relief sought for in this case? Petitioners contend that the Zoning Board of Appeals has no power to grant them relief on any substantive issues (denial of their application for an amendment which would grant them *use* rezoning) or procedural issues (denial of constitutional due process in an adjudicatory setting) which the District Court and the dissent in the first opinion in *South Gwinnett Venture* contend are involved in this case. The Code of Georgia and the Zoning Resolution of Gwinnett County, Georgia give the Local Zoning Board of Appeals only the following extremely *narrowly drawn* powers [see Ga. Code § 69-1211]:

(1) it can *correct errors* made by "an administrative official", which presumably means mistakes by the Building Inspector, although the act does not give any clues as to who he is supposed to be. Since the Building Inspector only issues permits at the threshold of building *after* a specific *use* is *approved*, he cannot commit "error" by refusing to issue a permit for an unauthorized use of the property;

(2) it can *grant a special exception*, but nowhere in the act are any standards set out to tell one what it is, or what one must do in order to get one. In virtually every jurisdiction, including Georgia, it has been construed as a very narrow concept, limited to airports, gasoline stations, etc. — the sorts of things which are either "one of a kind" in each community, or else nec-

essary but cannot be created as a matter of right; e.g., a "gas station district" would not work, really;

(3) it can *grant a variance* from the ordinance, but only under the following conditions:

> [w]here, *owing to special conditions*, a literal enforcement of the provisions of the ordinances or resolution will, in an individual case, result in *unnecessary hardship* . . . Such variance may be granted in such a case of unnecessary hardship upon a finding by the board of appeals that:
>
> (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape or topography, *and*
>
> (b) the application of the ordinance or resolution to this particular piece of property would create an unnecessary hardship, *and*
>
> (c) such conditions are peculiar to the particular piece of property involved, *and*
>
> (d) relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the ordinance or resolution: *Provided, however that no variance may be granted for a USE of land or building or structure that is prohibited by the ordinance or resolution.* Ga. Code § 69-1211 (emphasis added)[10]

---

[10] Article 15, §1605 of the Zoning Resolution of Gwinnett County sets forth virtually the same language, except that it adds one further proviso "and . . . Such conditions are

The last proviso really slams the door on any chances an owner might have for obtaining a *use* exception. Quite obviously, the variance is not a mechanism for implementing general principles, but only one for ironing out tiny wrinkles in the comprehensive plan wherever it pinches really hard. Thus, the Board of Appeals performs only a minor judicial function which assumes an extremely detailed plan in the background — otherwise, how could one tell if it really "pinches"? Traditionally, the granting of variances has been limited to small setback adjustments and other similar corrections, and the proviso in section (d) above makes it clear that this administrative agency has no power whatsoever to approve amendments which would rezone a tract for a different *use* than the one specified by the zoning commission in the comprehensive zoning plan, nor is it empowered to grant relief to a petitioner who makes a broad constitutional attack on the procedures which the local zoning authority used to decide whether or not to approve a request for an amendment to the plan to rezone a specific tract of land from one use to another, different use.

The discretionary power to *amend* the zoning ordinances is specifically *withheld* from the Zoning Board

---

not the result of any actions of the property owner . . ." This stipulation is definitely *ad hominem*, and may well be invalid because they refer to the person and not to a set of neutral principles governing the land. See *Vlahos Realty Co., Inc., v. Little Boar's Head*, 101 N.H. 460, 146 A.2d 257 (1958); cf. Note, *The Ad Hominem Treatment of Zoning Problems*, 109 U. Pa. L. Rev. 992 (1961). The idea that the plaintiff buys land knowing of the zoning restrictions is practically irrelevant—that is how most building gets done—by changing the zoning ordinance.

of Appeals and is vested *only* in the local governing body. See Ga. Code §§ 69-1210, and thus in Gwinnett County, Georgia if an application for an amendment to the zoning ordinance to rezone a specific tract of land is denied by the local zoning commission, there is no available administrative forum where the unsuccessful landowner can have the decision reviewed, because:

> (1) the only method by which one can obtain permission to change the *use* restrictions on his land is by amendment to the zoning ordinance,
>
> (2) the only body which has the power to grant an amendment to an existing ordinance is the zoning commission, and
>
> (3) the zoning commission has just denied the request for a change of use. Furthermore, because it contends that it is a "legislative" body exercising a "legislative" function when it denies an application for rezoning a specific tract of land, it contends that it does not have to disclose the reasons for its decision, nor does it need to disclose whatever evidence it considered, if any, in reaching its determination.

Thus, even if the Zoning Board of Appeals had the power to review amendment decisions, which it does not, the failure to state reasons would preclude any meaningful review and would constitute a fatal constitutional defect in the proceedings.

The procedural quirks just examined in the limited powers granted to the Zoning Board of Appeals demonstrate conclusively that there is in fact no administrative remedy at all provided to the rezoning petition-

er who has just unsuccessfully sought an amendment to the zoning ordinance as it applies to his particular tract of land, especially if he desires to challenge the decision-maker's procedure on broader constitutional grounds. Thus petitioners contend that they do not have to go first to the Zoning Board of Appeals when their case is one which the Zoning Board of Appeals has no authority to grant relief for, and therefore, the doctrine of primary jurisdiction is inapplicable to the facts of this case.

CONCLUSION

In view of the grave constitutional defects found in the procedures which the respondents used to deny petitioners' request for rezoning in this case, petitioners pray that their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be *granted.*

Respectfully submitted,

GORDON DEAN BOOTH
Counsel of Record for Petitioners

ROBERT N. MEALS, JR.
TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
1400 Candler Building
Atlanta, Georgia 30303
Of Counsel

CERTIFICATE

It is hereby certified that three (3) copies of the above and foregoing Petition for Certiorari and Appendix have been served upon opposing counsel of record by placing same in the United States Mail, postage prepaid this 10th day of June, 1974.

GORDON DEAN BOOTH

ROBERT N. MEALS, JR.